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No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE BOND MARKET ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 37.2 of the Rules of this Court, the Securities Industry Association, the Chamber of Commerce of the United States of America ("Chamber"), and The Bond Market Association move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

The Securities Industry Association ("SIA") advances the common interests of approximately 600 securities firms. Its primary mission is to build and maintain public trust and confidence in the securities markets. SIA's members include investment banks, broker-dealers, and mutual fund companies, and they are active in all U.S. and foreign markets and in all aspects of corporate and public finance.

The Chamber, a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Bond Market Association ("BMA") represents approximately 200 securities firms, banks, and asset managers that underwrite, trade, and invest in debt securities in the United States and abroad. BMA works with its member firms, Congress, the SEC, the Federal Reserve Board, the Federal Reserve Bank of New York, state regulators, and self-regulatory organizations to enhance the liquidity and efficiency of the bond markets. BMA's membership includes all primary dealers in U.S. government securities and all major dealers in U.S. agency securities, mortgage- and asset-backed securities, corporate

bonds and money market and funding instruments, as well as asset managers with $9 trillion in assets under management.

Amici have a vital interest in this case and are well situated to brief the Court on its implications. The Second Circuit panel held that certain practices relating to initial public offerings—practices that are heavily regulated by the SEC and in large part have been approved by it—could be the basis of lawsuits in antitrust. The judgment flies in the face not just of the SEC's energetic objections, but this Court's precedents on implied immunity. If the decision stands, *amici*'s members will face the prospect of massive liability for longstanding practices that promote the formation of capital. Accordingly, *amici*'s members will be deterred from a wide range of activities that the financial community has found useful and the SEC has deemed permissible in the public interest.

Amici therefore propose to give the Court guidance on matters that are especially within their expertise. *Amici* seek to explain the value and importance to the capital markets of practices that, considered in a vacuum, might seem anti-competitive. It is for good reason that Congress did not direct, and the SEC does not seek, the unqualified promotion of short-run competition above all other policy goals. *Amici* also are well positioned to advise the Court on the likely consequences for *amici*'s members—and ultimately the capital-raising process—of the regime adopted by the Second Circuit. The Chamber, for example, brings the perspective of *issuers* of securities, including corporations going public—a constituency that is affected by this case but is otherwise unrepresented in it.

For the foregoing reasons, SIA, the Chamber, and BMA should be granted leave to file the attached brief.

Respectfully submitted.

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The complaints sustained by the Second Circuit panel for the most part describe practices that have been standard techniques for raising capital for the better part of a century, and are expressly permitted by the SEC. The collaborative nature of an underwriting syndicate, and the interactions between underwriters and potential purchasers of initial public offering ("IPO") shares, might be suitable subjects of scrutiny if antitrust policies were all that mattered. Antitrust policies, however, are not all that matters. The SEC is expressly charged with balancing competition against other policies, including the formation of capital. Most of the practices that the plaintiffs depict as sinister collusion are in fact designed to facilitate the accumulation of capital and stabilize the market for the shares of a newly public company at an especially vulnerable time in its life cycle.

Although the complaints contain allegations of practices that may not be permitted under the securities regulations, the immunity analysis is not supposed to proceed by asking, as to each and every allegation at the pleading stage, whether the conduct in question is prohibited or permitted under the securities laws. On the contrary, in this area of fine and subtle distinctions drawn by the regulator, the immunity boundary must be broader than the boundaries drawn by the regulatory regime, or the very purpose of the immunity doctrine—to leave room for

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[1] Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

the regulatory regime to function as Congress and the SEC intend—would be thwarted.

If allowed to stand, the rule adopted by the panel below will disrupt the process of raising capital by over-deterring useful activities. Financial institutions will steer well clear of anything that could give rise to suspicions of antitrust violations—which create the potential for liability for treble damages and attorneys' fees—even if the result is to chill productive business arrangements. Underwriters will be discouraged from joining syndicates or insist on a higher premium to do so, and shares will not be distributed as widely or generate as much demand. The result is that many IPOs either will not occur or will be more expensive to the issuer, and the SEC's mandate to promote the formation of capital will be undermined.

Finally, if review is not granted in this case, the Court will likely not have another opportunity to rectify the problems created by the decision below. If the panel decision stands, every district judge in the Second Circuit—which is where cases of this nature frequently are brought, and in the future certainly will be brought—will be bound by it. The district judges will inevitably deny motions to dismiss on immunity grounds, and those decisions will not be appealable because they will not be final. Rational underwriters will then settle early on rather than proceed with a trial in hopes of eventually convincing the Second Circuit or this Court to reverse the rule adopted below. The issue therefore will be effectively shielded from review by this Court, even as the problems created by the decision below become a reality.

ARGUMENT

I. The Decision Below Sustains An Indiscriminate Attack On Long-standing Techniques For Raising Capital That Are Carefully Regulated To Balance Competition Against Other Essential Objectives

A. The plaintiffs have launched, and the Second Circuit has permitted, a frontal assault on one of the linchpins of the

private economy. It is through an initial public offering that American enterprises secure financing for major expansion, position themselves to obtain more capital and at lower cost in the future, create liquidity and therefore heightened value for their equity, attract and provide incentives to qualified employees, and enhance their visibility and prestige. See, *e.g.*, Bruce E. Crocker, *The Initial Public Offering Process*, 955 PLI/Corp 385, 387 (1996).[2] All but the smallest IPOs are conducted through an "underwriting syndicate," a group of investment banks that assume the risks associated with an offering and perform other services—most notably building a book of purchasers—in an effort to make the offering a success.

In order to make out the conspiracy element of their Sherman Act claim, the plaintiffs rely on allegations that—after the inflammatory tone and the conclusory accusations of unlawful conduct are, as the district court put it, "centrifuged" away, Pet. App. 86a—describe practices that have been accepted in corporate finance for a century.

These practices may not always maximize short-run competitiveness (although even that is far from certain[3]), but they do not necessarily have to. Congress, after careful study, has charged the SEC with balancing a number of policy objectives, including competition but also including the formation of capital. See 15 U.S.C. § 77b(b); 15 U.S.C. § 78c(f).

These goals are not always in harmony. As a leading antitrust scholar has explained:

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[2] American firms raise capital as well through public offerings of debt and of equity subsequent to the IPO. Such offerings frequently use the same syndication techniques targeted by plaintiffs. The effect of the panel's decision therefore will not be limited to IPOs but will extend to many other securities offerings.

[3] See Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. Corp. L. 607, 610-628 (2003).

> [Antitrust's] goals are much narrower than those of the [SEC], which is certainly concerned with the competitiveness of securities markets, but also with *the viability of sellers*, with the truthfulness of information, with sharp practices that may injure customers, and with *the smooth functioning of trading institutions*.
>
> *For the SEC these various goals may sometimes be in conflict and must be balanced against each other. By contrast, antitrust is myopic, and is concerned only with preserving competitive markets in the short run.*

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. Corp. L. 607, 609 (2003) (emphasis added); see also *id.* at 633 (noting that "the regulatory process is often concerned with more [than antitrust], including the vitality of the markets . . . and even the economic health of regulated firms").

It is because of this tension that the plaintiffs' lawyers here can look at techniques like syndicated underwritings and the allocation of shares to long-term investors rather than short-term speculators, and see only anti-competitive conduct, while actors in the real-world financial community—along with the SEC—understand that these are time-tested ways of financing young companies and stabilizing the price of their shares at an especially vulnerable time in their life cycle.

B. 1. The plaintiffs, for example, attack the formation of underwriting syndicates. They allege that defendants "regularly combined with one another during the Class Period into underwriting syndicates," that they agreed "that whichever of them was lead underwriter in a particular syndicate could itself distribute all the shares of each Class Security," and that "[a]ny member of the syndicate who did not sell the number of shares allocated to it . . . nevertheless shared in the underwriters' discount." Consol. Compl. ¶¶ 38-39.

That, however—as the SEC pointed out below, Pet. App. 153a-155a, and as even the Assistant Attorney General for Antitrust acknowledged, see Pet. App. 177a—does nothing more

than describe an accepted system for distributing new security issues. Since the early twentieth century, it has been common practice for a group of financial institutions—a syndicate headed by a single bank (the "lead" or "managing" underwriter)—to purchase a set number of shares from the issuing company and then resell them to the public at a fixed price. See Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 76-85 (4th ed. 2004). The banks perform a number of crucial functions in the offering process. First of all, they are experts in the valuation and distribution of new securities, and therefore can guide the company through the offering process. Relatedly, the banks are in a position to publicize the offering among investors and to assemble purchasers in order to make the offering a success. Crocker, *supra*, at 391-392.

Finally, it is the banks that make the offering economically attractive by assuming from the issuer the risks that the offering will fail—in other words, that the shares will not be sold because the public is not interested or the price is too high. The nature of an equity offering is that the issuer agrees to part with a pre-determined percentage of its equity in exchange for a pre-determined amount of capital. The bank in essence guarantees (hence, underwrites) that the issuer will receive that amount of capital and assumes, in exchange for a premium, the risk that the offer will fail. See, *e.g.*, *Institutional Investor Study Report of the SEC*, H.R. Doc. No. 92-64, Pt. 5, at 2511 (1971) ("*Institutional Investor Study*"); Loss & Seligman, *supra*, at 83. The banks' compensation also includes a management fee, which reflects their services in connection with the offering, as well as their expertise and reputation, on which the success of the offering depends. See *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 2001 WL 128321, at *8 (S.D.N.Y. Feb. 14, 2001), *vacated*, 52 Fed. App. 548 (2d Cir. 2002); *Institutional Investor Study*, at 2519.

The reasons why banks form syndicates, rather than just manage IPOs individually, are to share the risk and, frequently, to obtain an optimal distribution and public profile for the stock.

Crocker, *supra*, at 392; *Institutional Investor Study*, at 2520.The SEC and the National Association of Securities Dealers, which is subject to SEC oversight, comprehensively and pervasively regulate syndicates and communications among their members, see Pet. App. 87a-89a (reviewing authorities), and permit much of the conduct described in the complaint. For instance, to return to the allegations quoted above, it is perfectly normal for a lead underwriter to distribute an entire offering while other syndicate members are still compensated for having assumed risk in connection with the offering. See Pet. App. 154a; Loss & Seligman, *supra*, at 81.

Antitrust law ultimately permits many competitor collaborations, but it often requires case-specific scrutiny of "the extent to which the participants and the collaboration have the ability and incentive to compete independently." Federal Trade Commission & U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.3 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("Competitor Collaboration Guidelines"). "[B]y limiting independent decision making or combining control over . . . competitively sensible variables, an agreement may create or increase market power . . . ." *Id.* § 3.31. Thus, applying antitrust law to the formation and workings of syndicates threatens to substitute one-by-one assessments of the competitive alternatives to each arrangement for the generic determination by the SEC and the regulated industry that this manner of doing business is sensible, efficient, and in the public interest. Requiring each syndicate to justify its existence and operation, starting from scratch, would create a certain drag on the economy and on capital formation.

2. The plaintiffs also train their fire on the standard methods of generating interest in a new offering, assessing investor demand for it, and allocating the initial distribution. The plaintiffs accuse the defendants, for example, of:

> host[ing] "road shows" during which customers were introduced to the issuer and its managers and during which the offering was described. Defendants also conducted

> telephone calls, meetings and other regular communications prior to the IPOs of Class Securities. During, or as part of these communications, including communications separate and apart from the "road shows," defendants, at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares.

Consol. Compl. ¶ 54. But all of these activities are recognized components of the IPO process. After the decision to go public has been made, the lead underwriter arranges the company's "road show," a series of meetings that executives of the company and representatives of the underwriters hold with investors across the country and sometimes overseas in order to generate demand for the new offering. See, *e.g.*, Loss & Seligman, *supra*, at 83; Crocker, *supra*, at 396.

At the same time, the underwriters need to gather information on investor demand so they can properly price and size the issue and "build a book" for it. The underwriters collect non-binding "indications of interest" regarding how many shares and at what prices investors would purchase them both in the offering and in the aftermarket. The underwriter's goal is to build a book of orders that greatly exceeds the size of the offering, because then the underwriter can be selective about who will receive shares and make optimal allocation decisions. Crocker, *supra*, at 396; Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, SEC Release No. 33-8565, 70 Fed. Reg. 19,672, 19,674-75 (Apr. 13, 2005) ("Prohibited Conduct Release").

The plaintiffs, however, want to characterize the book-building process as a broad conspiracy, designed only to enrich underwriters and their favored clients at the expense of the public (Pfeiffer Compl. ¶¶ 69-70):

> During the relevant period, the Underwriter Defendants kept careful records showing the trading activity of all their broker-dealer clients and categorized these clients according to the length of time they would hold securities allocated to them . . . .
>
> [S]ecurities in "hot issue IPOs" were sold only to those customers who satisfied the retention criteria for their allocations.

But the "*J'Accuse!*" here rings hollow. In any IPO, the issuer and the bank want to allocate blocks of shares to more desirable customers—ones who are likely to hold the investment for a period of time, rather than quickly sell, or "flip," them for a short-term speculative profit. *E.g.*, SEC, *Report of Special Study of Securities Markets*, H.R. Doc. No. 88-95, Pt. 1, at 523 (1963) ("*Report of Special Study*"). "Flipping" increases volatility and may depress the price, to the detriment of both underwriter and issuer. See, *e.g.*, Richard B. Carter & Frederick H. Dark, *Underwriter Reputation and IPOs: The Detrimental Effect of Flippers*, 28 Fin. Rev. 279, 282-283 (1993); *Friedman* v. *Salomon/Smith Barney, Inc.*, No. 98 Civ. 5990 (NRB), 2000 WL 1804719, at *2 (S.D.N.Y. Dec. 8, 2000), *aff'd*, 313 F.3d 796 (2d Cir. 2002). Accordingly, the banks, in making allocation decisions, rely on their knowledge of and relationships with institutional investors, broker-dealer intermediaries who themselves have relationships with preferred customers, and the indications of interest received during and after the road show. See Loss & Seligman, *supra*, at 80-81; SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, *at* http://www.sec.gov/answers/ipodiff.htm ("*Difficulty Getting Shares*"). In any event, an underwriter "is free to distribute its allotment of new securities as it sees fit among its customers." See, *e.g.*, SEC, *Allocation of New Issues of Securities*, 1994 WL 744595 (Oct. 18, 1994).

Policies to combat flipping are plainly in the public interest, and the SEC's supervision protects against abuse. Yet, if the Sherman Act applies to those policies, the "mere" fact that they serve the public interest might well be deemed irrelevant.

"[T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest . . . ." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978). Although the policies ultimately should be upheld under the antitrust laws, see note 4, *infra*, subjecting them to a mode of analysis that ignores the public interest makes no sense, and is not what Congress intended.

3. The plaintiffs also suggest that price-stabilization techniques are anti-competitive practices that warrant treble damages (Pfeiffer Compl. ¶¶ 78, 81):

> in order to ensure that they would receive large allocations of stock, the Institutional Defendants agreed to the terms and conditions established by the Underwriter Defendants.
>
> . . .
>
> The Institutional Defendants agreed that, in exchange for the large IPO allocation, they would hold these securities for an extended period of time.

But this makes out nothing more than a restriction on "flipping." Such a restriction is a permissible technique for stabilizing the price of a new offering. See, *e.g.*, Pet. App. 190a; *Difficulty Getting Shares* ("[S]ome firms impose restrictions on investors who 'flip' or sell their IPO shares soon after the first day of trading . . . . If you flip your IPO shares, your firm may refuse to sell you other IPOs altogether or prevent you from buying an IPO for several months.").

Indeed, for sixty years or more, the SEC has recognized the importance of price stabilization and permitted various measures to achieve it. See, *e.g.*, *Friedman*, 2000 WL 1804719, at *6-*10 (reviewing history of SEC's attentive regulation of stabilizing practices); *Report of Special Study*, at 526. For example, underwriters are allowed, once trading has begun, to place bid orders at a given threshold so that sell orders meeting the bids will be absorbed and a price decline will be slowed or stopped. Moreover, underwriters sometimes have the contractu-

al right to penalize an intermediate dealer, either by canceling its concessions or its sales commissions, when shares it sold come back onto the market. The theory is that the dealer did not earn his concession if he did not "find a good home" for the shares. Loss & Seligman, *supra*, at 82, 1138; see also *Friedman*, 2000 WL 1804719, at *2, *9 (noting that SEC has permitted arrangements in which the lead underwriter may reclaim fees from a syndicate member when the securities the member sells come back onto the market).

Price stabilization may not be an especially competition-enhancing activity, at least not in the short term[4]—it is, after all, a form of market manipulation, see SEC Release No. 34-2446, 1940 WL 968, at *1 (Mar. 18, 1940)—but, as with the majority of the conduct alleged by the plaintiffs, the SEC has judged that any adverse effects on competition are more than outweighed by the stabilizing effect on the markets and the capital-forming benefits to newly public firms.

In sum, much of the complaint consists of nothing more than a description of the syndicated underwriting process that the plaintiffs have dressed up for Halloween. To hold, as the panel below has done, that such allegations can be the basis for an antitrust class action is to permit a destructive assault on a system that until now has strived to strike a delicate balance between competition and other essential policies.

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[4] But see Hovenkamp, *supra*, at 622 ("Antitrust requires an injury to competition, and not just to individual buyers. This would require a showing that overall prices are higher or output lower in some properly defined market. It is hard even to produce an argument that anti-flipping rules are anticompetitive as a general matter, even though some individual buyers who prefer to churn their shares will earn less as a result.").

II. The Purposes Of The Immunity Doctrine Are Defeated If The Immunity Analysis Is Preceded By A Fine-Grained Analysis Of The Legality Of Each Allegation Under The Securities Laws

The Assistant Attorney General for Antitrust took the position below, and the panel implicitly agreed, see Pet. App. 65a-67a, that immunity here is not appropriate because a portion of the allegations describe conduct—particularly "tie-ins" and "laddering"—prohibited by the SEC. But immunity from antitrust cannot possibly hinge on whether, as to each specific allegation, there is a literal conflict between antitrust and the securities laws.

Rather, the question must be whether the application of antitrust law to this *area of activity* would interfere with the operation of securities regulation. As the SEC explained below: "[A]s the Supreme Court indicated in *Gordon* [v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)], *the concern is with protecting the full scope of the regulatory regime*, and of the Commission's freedom to act, not with whether the particular conduct has been approved." Pet. App. 149a-150a (emphasis added). The line of immunity cannot precisely trace the line separating permissible and impermissible conduct under the securities laws. On the contrary, the former must give some berth to the latter, or the objectives of the immunity doctrine will be defeated.

This point is illustrated by *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *Trinko* concerned the question whether Verizon could be liable in antitrust for alleged anticompetitive conduct that squarely violated the Telecommunications Act of 1996 (the "1996 Act"). This Court all but said that implied immunity would have been appropriate, had Congress not explicitly reserved the applicability of the antitrust laws with a saving clause. The Court noted, in language equally applicable here (*id.* at 406):

> [A] detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. See, *e.g.*, *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U.S. 694 (1975) ["*NASD*"]; *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme "that might be voiced by courts exercising jurisdiction under the antitrust laws." [*NASD*, 422 U.S.] at 734. Congress, however, precluded that interpretation.

The only real difference between the relevant legal context in *Trinko* and this case is the saving clause in *Trinko*, which *required* this Court to reject immunity. Here, there is an equivalently "detailed regulatory scheme," but there is no saving clause. Thus, if the panel below had approached this case the same way this Court analyzed *Trinko* only two years ago—that is to say, had the panel focused, as the SEC and the defendants urged it to do, on the existence of an agency's "regulatory scheme" with which the judgment of an antitrust court could conflict—the result would certainly have been recognition of implied immunity. Instead, the panel dismissed *Trinko* as irrelevant. See Pet. App. 41a n.36.

The Court in *Trinko*, because it could not hold that Verizon was immune from antitrust liability for the conduct there at issue, went on to consider the value of applying antitrust laws to certain kinds of allegedly anticompetitive conduct in the telecommunications industry. Its analysis on this point (which cites *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963) and *NASD*, see 540 U.S. at 412), is a close cousin of the immunity analysis and has illustrative value here.

The Court in *Trinko* in effect asked two questions: "First, how well is the regulatory enterprise itself doing its job of

identifying and controlling competitive harms?" and "Second, how much confidence do we have that application of the antitrust laws will improve competition in the situation at hand?" Herbert Hovenkamp, The Antitrust Enterprise 237 (2005). The Court determined that the telecommunicatons regulatory regime "was an effective steward of the antitrust function" and that the marginal additional benefits of antitrust law in the situation at hand were not worth their cost. 540 U.S. at 411-415.

Similar concerns come into play here. There is no serious suggestion that the SEC is not a vigilant and capable regulator or that it is not executing its mandate to promote competition in conjunction with other objectives. In fact, to the extent the complaint might allege actual securities-law violations, the SEC is "actively pursuing comprehensive regulatory responses." Pet. App. 127a-128a; Pet. 7. As for improving competition, in the IPO context as in *Trinko*, "[t]he cost of false positives counsels against an undue expansion" of antitrust liability. *Trinko*, 540 U.S. at 414. False positives—the cost of which, as discussed below, include over-deterrence and a concomitant increase in the cost of capital—are especially likely in the IPO context because of the SEC's careful line-drawing.

The SEC has long used its expert knowledge of the securities markets to draw fine distinctions between permissible and impermissible conduct in an effort to balance the promotion of competition against other objectives. To take just one example, the SEC has determined that if, during the book-building process, a sales representative "[s]olicit[s] customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock," the representative has violated Regulation M,[5] which prohibits inducing bids and purchases before the end of the distribution. Prohibited Conduct Release, *supra*, at 19,675. By contrast, the closely related act of

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[5] 17 C.F.R. §§ 242.100 – .105 (2005).

"inquiring as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity" is allowed. *Id.* at 19,676.

The subtleties of distinctions like this one are not likely to be appreciated by a lay jury applying an amorphous rule of reason in antitrust. The SEC's carefully calibrated regime would, in effect, be replaced by the blunt and sometimes unpredictable instrument of antitrust.[6] And yet, the entire point of the immunity doctrine in the securities context is to give the SEC room to do its job.

That is why it is no answer to say that, even if immunity is denied, it is no big deal because an antitrust court can take into account the existence of the SEC's regulatory scheme. See Pet. App. 58a-60a. The reality is that these decisions are frequently made by juries, not courts. Indeed, the panel below quotes the decision of then-Circuit Judge Kennedy in *Phonetele, Inc.* v. *AT&T Co.*, 664 F.2d 716 (9th Cir. 1981): "While a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be *established as a matter of fact in individual cases*." *Id.* at 737 (emphasis added). But "matters of fact in individual cases" in our legal system are determined by juries, not judges. See also 2 Phillip E. Areeda et al., Antitrust Law ¶ 306, at 57 (2d ed. 2000) (noting that "many counsel and judges leave the jury to apply an unelaborated legal standard," even if that is not correct

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[6] See Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12 (1984) ("When everything is relevant, nothing is dispositive. . . . The formulation offers no help to businesses planning their conduct. Faced with a list of such imponderables, lawyers must engage in ceaseless discovery."). See also Competitor Collaboration Guidelines § 3.3 ("Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. . . . Ordinarily, . . . no one factor is dispositive in the analysis.").

practice). Perhaps judges may be able wisely to take stock of the activities of a regulator to determine whether it is promoting competition and doing so in the correct measure—although even that inquiry will yield unpredictable results—but it is certain that juries can do no such thing. Accordingly, it will be impossible to counsel clients to do anything other than steer well clear of the legal lines.

For all of these reasons, the Second Circuit panel approached the issue from the wrong direction when it assessed the antitrust immunity of the plaintiffs' pleading-stage allegations only after examining them through the high-resolution microscope of the securities laws. The first question has to be not whether the securities laws do or do not allow each particular allegation, but rather whether the entire scheme of securities regulation in this area will be disrupted if it must constantly edge right up against antitrust. As this Court has explained, in circumstances analogous to the present ones (*Gordon*, 422 U.S. at 688):

> We believe that the United States, as amicus, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress.

This case is similar. The Assistant Attorney General and the Second Circuit panel have focused on the later-stage questions of which conduct is permitted by which regime. Those questions leapfrog over the logically prior issue, which is whether, if antitrust immunity is not implied as a matter of law, the

securities statutes will "function as envisioned by Congress." In this case, they will not.

III. The Decision Below Will Deter Useful Conduct In The IPO Context And Therefore Interfere With The Objectives Of Securities Regulation

The decision below will subject *amici*'s members to the potential for enormous exposure. In this case, for instance, the plaintiffs are seeking damages for drops in market value associated with at least 850 initial public offerings from 1997 to 2001. See Consol. Compl. Ex. A; Pfeiffer Compl. ¶ 4. The plaintiffs may claim that their damages run into the hundreds of billions of dollars—and that is before trebling. See Securities Industry Fact Book 2002, at 10 (SIA 2002), *available at* http://www.sia.com/research/pdf/2002Fact_Book.pdf (IPOs raised $76.1 billion in 2000 alone). Moreover, as with securities class actions, there will be nothing to prevent any future class actions against underwriters for antitrust violations whenever the market declines. Under the Second Circuit's rule, many of *amici*'s members could become de facto insurers against market drops.

The result will be to disrupt the process of capital formation. The major concern of *amici*'s members from now on will no longer be maximizing value within the intricate, expertly tailored securities-regulatory regime, but rather steering wide and clear of any activity that could even remotely implicate antitrust concerns and the concomitant potential for crippling awards of treble damages and attorneys' fees. The financial community, in short, will experience what this Court has described as "the problem of 'overdeterrence,' *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business arrangements." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981); see also Pet. App. 193a-194a (SEC warning court below against "discouraging useful interactions among participants in the offering process" and thus "over-deter[ing] conduct that would serve the interests of the markets and the capital formation process").

The SEC starkly warned in the district court that to sustain the complaints in this case "threatens" the entire syndicate offering system because "mere participation in a syndicate could be construed to be sufficient, without more, to uphold a finding of an antitrust violation against all the participants." Pet. App. 155a. The SEC is right. What is more, the very nature of a syndicate entails activity that could raise antitrust concerns—forming agreements, fixing prices, sharing information about customers. If conduct connected to these activities has even the potential to subject the underwriters to liability for treble damages plus attorneys' fees, many underwriters simply will decline to join syndicates or will do so only for a higher fee. Syndicates will become rarer or more expensive, but either way the result will be that the underwriter or group of underwriters will demand from the issuer a higher risk premium. That is, the cost of capital to issuers will increase, which necessarily means that some IPOs that would have otherwise occurred will not take place at all, because they will be too expensive for the issuer. See, *e.g.*, Crocker, *supra*, at 388 (noting that "[i]n order to attract the interest of major investment banks and institutional investors, a company must be able to offer at least $15 million of equity in its IPO").

Another result of the rule below is that book-building will become more difficult. Recall that one purpose of the syndicate is to distribute shares more widely. If overdeterrence makes syndicates smaller and rarer, then we can expect shares to be distributed to fewer investors. At the same time, the threat of antitrust liability will inhibit underwriters from having conversations about the IPO with, and therefore allocating shares to, anyone but their most trusted clients. Even with those clients, the chill produced by the decision below may deter the banks from getting good information about investor interest. Accordingly, demand for an offering will be lower and valuations will be less favorable. The end result is again that

IPOs will become more expensive, and many that would have otherwise occurred will simply not take place.[7]

When all is said and done, then, the result of the decision below will be a net transfer of wealth from companies going public to class-action plaintiffs and their lawyers. This result, which undermines the SEC's statutory mandate to promote the formation of capital, cannot be what Congress intended.

Indeed, the same Congress that expressly directed the SEC to balance competition against other factors—see National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424-3425 (1996)—enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995). As this Court recently observed, the PSLRA was motivated by a concern that "nuisance filings, targeting of deep-pocket defendants, . . . and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 74 U.S.L.W. 4167, ___ (U.S. Mar. 21, 2006). Allowing the present lawsuits to proceed would circumvent the safeguards of the

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[7] Still another possibility, especially for a foreign corporation, is that the issuer will proceed with its IPO, but list its shares on a foreign exchange instead of in this country. The prospect of companies choosing to list overseas rather than in the United States because of heightened costs here is not merely hypothetical. See, *e.g.*, Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, Wall St. J., at C1 (Jan. 26, 2006) (reporting that in 2005, 90% of the money raised in IPOs by foreign issuers came from listings outside the U.S.—whereas in 2000, 90% came from listings inside the U.S.—and that a major reason for the shift is the increased costs created by the 2002 Sarbanes-Oxley legislation); see also Michelle Tsai & Lynn Cowan, *Chinese IPOs Stick Close to Home*, Wall St. J., at C4 (Mar. 20, 2006) (noting that Chinese companies tend to list in Hong Kong rather than the U.S., in part because "[t]he U.S. requirements are considered more onerous, and the threat of investor litigation higher.").

PSLRA by repackaging what are in essence securities fraud claims, see *In re IPO Securities Litigation*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (securities fraud suits based on the same allegations leveled here), as antitrust complaints. Congress's concerns about abusive class-action litigation would be realized, except that the economic harm would be three times greater.

IV. This Is Likely To Be The Court's Only Opportunity To Rectify The Enormous Problems Created By The Decision Below

No purpose would be served by waiting to review this issue until more courts have addressed it, because that is unlikely to happen. The Second Circuit sits in the nation's financial capital and presides over the Southern District of New York, which historically has processed a great many lawsuits alleging misdealing in connection with securities markets. Plaintiffs and the Judicial Panel on Multidistrict Litigation ("JPMDL") tend, respectively, to file in and transfer to the Southern District of New York the most complicated securities suits arising out of the highest-profile scandals and seeking the largest amounts of money.[8] Certainly the decision below gives plaintiffs' lawyers no reason to bring suits challenging securities offering practices on antitrust grounds in any other Circuit, nor is there any reason for the JPMDL to change its practice.

If the panel's decision stands, civil procedure and economics will conspire to shield the issue from this Court. Treble-damage class actions against underwriters alleging antitrust violations are certain to become a post-market-decline routine.

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[8] See generally, *e.g.*, *In re Worldcom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392 (S.D.N.Y. 2003); *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 273 F. Supp. 2d 351 (S.D.N.Y. 2003); *In re IPO Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); *In re IPO Antitrust Litig.*, 287 F. Supp. 2d 497 (S.D.N.Y. 2003); *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 2001 WL 128321 (S.D.N.Y. Feb. 14, 2001).

Under the decision below, every judge in the Second Circuit will reject, at the motion-to-dismiss stage, the defense of immunity. The denials of the motions to dismiss will not be appealable because they are not final decisions. See 28 U.S.C. § 1291. Even if a different panel of the Second Circuit were inclined to revisit the holding below, it could not do so until after a trial on the merits in which judgment was granted for the plaintiffs. But no rational financial institution will wait that long. Given the enormous sums and the risks involved, underwriters will be under enormous pressure to pay a great deal now rather than hold out and risk paying a gargantuan amount later. The prospects that, if the underwriters would only wait until they have lost at trial, a different panel of the Second Circuit might well change course or this Court might grant review will provide little comfort.

Thus, as a practical matter, if certiorari is not granted now, this Court is unlikely ever to review the issues raised by the petition. Although this Court sometimes "postpone[s] consideration of [an] issue until more . . . federal circuits have experimented with [it]," see *Gilliard* v. *Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from denial of cert.), here the pressure to settle, and the concentration of these cases in New York, make further experimentation unlikely. Denying the petition would effectively banish to the unreviewable realm of settlement negotiations a legal question of "great importance to the public and the financial community." *Silver*, 373 U.S. at 342.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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